

115TH CONGRESS }  
*1st Session*

SENATE

{ REPORT  
115-194

SMALL BUSINESS REGULATORY  
FLEXIBILITY IMPROVEMENTS ACT OF 2017

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R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
WITH MINORITY VIEWS

TO ACCOMPANY

S. 584

TO AMEND CHAPTER 6 OF TITLE 5, UNITED STATES CODE  
(COMMONLY KNOWN AS THE "REGULATORY FLEXIBILITY ACT"),  
TO ENSURE COMPLETE ANALYSIS OF POTENTIAL IMPACTS ON  
SMALL ENTITIES OF RULES, AND FOR OTHER PURPOSES



DECEMBER 14, 2017.—Ordered to be printed

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SMALL BUSINESS REGULATORY FLEXIBILITY  
IMPROVEMENTS ACT OF 2017

DECEMBER 14, 2017.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and  
Governmental Affairs, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 584]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 584) to amend chapter 6 of title 5, United States Code (commonly known as the “Regulatory Flexibility Act”), to ensure complete analysis of potential impacts on small entities of rules, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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## I. PURPOSE AND SUMMARY

S. 584, the Small Business Regulatory Flexibility Improvements Act (SBRFIA), follows previous attempts by Congress to build into the Federal regulatory policymaking process a voice for, and consideration of the potential impacts on, small businesses, non-profits, and local governments. It also addresses deficiencies in the extant laws by making more robust the requirements and review mechanisms applicable to agencies when contemplating rules which may have a significant effect on small entities.

## II. BACKGROUND AND THE NEED FOR LEGISLATION

### *Small Business Act*

The formal recognition of the unique impact of Federal policy on small enterprises goes back to at least 1953 with the establishment of the Small Business Administration via enactment of the Small Business Act of 1953.<sup>1</sup> That act states, in describing the underlying goal of the legislation:

The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed.<sup>2</sup>

The Small Business Act, and its establishment of the Small Business Administration (SBA), was a successor to previous Federal efforts to aid small enterprises, including the Reconstruction Finance Corporation<sup>3</sup> and the Smaller War Plants Corporation.<sup>4</sup> These initiatives, along with the earliest iteration of the SBA, had missions which concerned primarily providing financing, facilitating credit, and enhancing access to Federal projects and contracts for small businesses and federal contractors. These early efforts, however, did not explicitly address the issue of regulation’s disproportionate effect on small businesses.

### *Effect of regulation on small businesses*

Regulations can have an overall aggregate effect that differs from their particular effects on specific sectors or types of entities, and, “[t]he cost of government regulation almost always includes both variable and fixed components, with variable costs being a function of the size of the regulated transaction.”<sup>5</sup> In the simplest fixed cost case, where costs are invariant to a firm’s size or activity-level, such as a one-time capital outlay for a smokestack scrubber,<sup>6</sup> the

<sup>1</sup> An Act to Create the Small Business Administration and to Preserve Small Business Institutions and Free, Competitive Enterprise, Pub. L. No. 83–163, 67 Stat., Title II.

<sup>2</sup> *Id.* at § 202.

<sup>3</sup> *Records of the Reconstruction Finance Corporation [RFC]*, NAT. ARCHIVES, § 234.1, <https://www.archives.gov/research/guide-fed-records/groups/234.html> (The Corporation was established in 1932 and eliminated via the Small Business Act).

<sup>4</sup> Active from 1942 through 1945 during World War II, *id.* at 240.1.

<sup>5</sup> C. Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. OF SMALL AND EMERGING BUS. L. 6 (2004).

<sup>6</sup> This is the canonical example, explored more in depth in, *see, e.g. id.* at 7.

regulation will impose a proportionately higher cost on smaller firms, with the proportionate cost of compliance decreasing in firm size (or firm output). That is, a fixed cost will require a larger share of the small firm’s resources (labor or capital) to be reallocated toward compliance and away from wages and investment—the same cost will have a smaller effect the larger the firm and the average cost (per employee or transaction) is lower.

Information costs—the costs to review and understand regulations—can sometimes exhibit fixed cost characteristics.<sup>7</sup> A firm may need to hire lawyers, compliance officers, or human resources managers to ensure compliance with the regulatory framework applicable to their industry. While these labor costs may be incurred on an hourly or part-time basis, absent special considerations in the law, the firm (large or small) is still responsible for knowing and complying with all relevant portions of the body of regulations.<sup>8</sup>

One result of this phenomenon, consistent with the policy statement contained in the Small Business Act,<sup>9</sup> is an anti-competitive effect: “large fixed costs can lead to market structures with fewer, larger firms (increased market concentration)” because “[w]hen fixed costs increase substantially, it requires that a firm have a larger output level to maintain profitability.”<sup>10</sup> Indeed, from one of the largest single increases in Federal regulation<sup>11</sup> came what one prominent CEO of a large financial institution identified as a “moat” defending his company from competition.<sup>12</sup> Another prominent investment bank executive put it in more direct terms when he identified the effects of regulatory requirements as “hav[ing] raised the barriers to entry.”<sup>13</sup> The reason for this is because regulatory compliance often entails differential impacts and economies of scale.<sup>14</sup>

Variable costs are typically proportional (linear) or decreasing (convex) in firm size. Consider a rule which requires a construction company to provide a hardhat for each jobsite employee—this cost increases at a rate directly proportional to the number of employees. But a variable cost may also be “lumpy” or discontinuous. For example a rule may require providing one outdoor toilet per 50 employees—if a firm has fewer than 50 employees, it has no way of

<sup>7</sup>*Id.* at 8–9.

<sup>8</sup>Office of Advocacy, U.S. Small Business Administration, Report on The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business (1995), (“A significant body of knowledge must be gained by a firm to determine whether a regulation applies to it, whether it is in compliance, or what action must be taken to be in compliance. For example, a firm must first learn that a form is required by rule, determine if the firm is required to submit that form, and then determine how to complete the form correctly. These fixed information-gathering costs are the same for all firms, whether large or small.”).

<sup>9</sup>An Act to Create the Small Business Administration and to Preserve Small Business Institutions and Free, Competitive Enterprise, Pub. L. No. 83–163, § 202, 67 Stat. 4.

<sup>10</sup>STEVEN HACKETT, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS: THEORY, POLICY, AND THE SUSTAINABLE SOCIETY 154 (2d ed.) (2001).

<sup>11</sup>Patrick McLaughlin, Oliver Sherouse & Daniel Francis, *Dodd-Frank is One of the Biggest Regulatory Events Ever*, QuantGov, <https://quantgov.org/charts/dodd-frank-is-one-of-the-biggest-regulatory-events-ever>.

<sup>12</sup>Joe Wiesensthal, *The 4 Things That Worry Jamie Dimon . . .*, BUS. INSIDER, Feb. 4, 2013, <http://www.businessinsider.com/the-four-things-that-worry-jamie-dimon-2013-2>.

<sup>13</sup>Opinion, *Regulation is Good for Goldman*, WALL ST. J., Feb. 11, 2015, <https://www.wsj.com/articles/regulation-is-good-for-goldman-1423700859>, (citing comments made by Mr. Blankfein at an investor conference).

<sup>14</sup>*See, e.g.*, Marshall Lux & Robert Greene, *The State and Fate of Community Banking* 13 (Mossaver-Rahmani Center for Business and Government, M-RCBG Associate Working Paper Series, No. 37, 2015) (“[T]he discrepancy in performance between large and small community banks in part stems from the disproportionate cost of regulation on smaller institutions.”).

proportionately reducing its cost.<sup>15</sup> Or consider a license for a tax accounting program which may be subject to pricing per user but not per usage, resulting in a relatively higher cost for less intensive users of the product.

Taken together, the fixed and certain variable components of a regulation's costs can result in an economic outcome that is sub-optimal and to which policymakers should pay particular attention. Numerous analysts have attempted to quantify the scale of this differential regulatory impact.<sup>16</sup> One difficulty in doing so is fully accounting for the effective "shadow price" on the creation of new firms in the absence of a regulation (or relaxing its requirements). In other words, calculating the costs to a business to fully comply with a regulation may only partially capture the rule's economic effect because it does not account for those firms that may have formed in the absence of those costs (the aforementioned barriers to entry).<sup>17</sup> And a growing body of literature points toward the importance of new firms (more so than small ones, though most are by nature small at inception) for producing jobs and economic growth.<sup>18</sup>

#### *Regulatory Flexibility Act*

In 1980, Congress formally acknowledged this regulatory effect phenomenon and passed the Regulatory Flexibility Act (RFA) which placed into statute requirements that Federal agencies consider the impacts on small entities of proposed Federal regulations.<sup>19</sup> The RFA formalized a longstanding recognition of the potentially differential and disproportionate impacts regulations may have on small entities vis-à-vis large ones, and further "establish[ed] as a principle of regulatory issuance that agencies shall endeavor . . . to fit regulatory and informational require-

<sup>15</sup> Bradford, *supra* note 6, at 7–8.

<sup>16</sup> See, e.g., NICOLE V. CRAIN & W. MARK CRAIN, SMALL BUS. ADMIN., THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS iv (2010) ("As of 2008, small business face an annual regulatory cost of \$10,585 per employee, which is 36 percent higher than the regulatory cost facing large firms (defined as firms with 500 or more employees)."); BEN GITIS & SAM BATKINS, REGULATORY IMPACT ON SMALL BUSINESS ESTABLISHMENTS, AMERICAN ACTION FORUM, (2015) ("The results . . . indicate that regulations cumulatively have a highly regressive effect on businesses.").

<sup>17</sup> Aggregate economic data may obscure underlying forgone economic activity, such as a "missing generation" of new firms. See, e.g., Francois Gourio, Todd Messer & Michael Siemer, *What is the economic impact of the slowdown in new business formation?*, 326 CHI. FED. LETTER (2014); Leora Klapper, Luc Laeven & Raghuram Rajan, *Entry regulation as a barrier to entrepreneurship*, 82 J. OF FIN. ECON. 2006, ("We find that costly regulations hamper the creation of new firms, especially in industries that should naturally have high entry. These regulations also force new entrants to be larger and cause incumbent firms in naturally high-entry industries to grow more slowly."); Lee Branstatter, et. al., *Do Entry Regulations Deter Entrepreneurship and Job Creation? Evidence from Recent Reforms in Portugal*, 124 THE ECON. J. 805 (2014); Jamal Ibrahim Haidar, *The Impact of Business Regulatory Reforms on Economic Growth*, 26 J. OF THE JAPANESE AND INT'L ECONOMIES 285 (2012); and James Bailey & Diana Thomas, *Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment* (2015) (Mercatus Center working paper).

<sup>18</sup> See generally, Jason Wiens and Chris Jackson, Ewing Marion Kauffman Foundation, *The Importance of Young Firms for Economic Growth*, ENTREPRENEURSHIP POLICY DIGEST (2015); Alexander S. Kritikos, *Entrepreneurs and their impact on jobs and economic growth*, IZA WORLD OF LABOR (2014); John Haltiwanger, Ron S. Jarmin & Javier Miranda, *Who Creates Jobs? Small versus Large versus Young*, 95 THE REV. OF ECON. AND STATISTICS 347 (2013); Ryan Decker, et. al., *The Role of Entrepreneurship in US Job Creation and Economic Dynamism*, 28 J. OF ECON. PERSPECTIVES 3 (2014); Zoltan Acs and Catherine Armington, *Employment Growth and Entrepreneurial Activity in Cities*, 38 REG'L STUDIES 911 (2004) ("Findings indicate that higher rates of entrepreneurial activity were strongly associated with faster growth of local economies."); ANDRE VAN STEL, EMPIRICAL ANALYSIS OF ENTREPRENEURSHIP AND ECONOMIC GROWTH (2006).

<sup>19</sup> Regulatory Flexibility Act, Pub. L. No. 96–354, 94 Stat. 1164.

ments to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.”<sup>20</sup>

Among other things, the RFA outlines particular considerations agencies must address as part of what it calls a “regulatory flexibility analysis.”<sup>21</sup> It requires agencies to publicly preview likely forthcoming rules that are “likely to have a significant economic impact on a substantial number of small entities” in a semi-annual report,<sup>22</sup> as well as solicit public input as part of the rule’s development.<sup>23</sup> It also directs the SBA’s Chief Counsel for Advocacy to monitor “agency compliance with” the RFA and report thereon to the President and Congress, as well as authorizes the Chief Counsel “to appear as *amicus curiae* in any action brought in a court of the United States to review a rule.”<sup>24</sup>

*S. 584, the Small Business Regulatory Flexibility Improvements Act*

SBRFIA aims to address perceived deficiencies in the RFA, later amended by the Small Business Regulatory Enforcement Fairness Act) in 1996.<sup>25</sup> One issue with the RFA was that “agency compliance . . . was at best sporadic” because “[a]gencies faced little threat from non-compliance, since judicial review of regulatory flexibility analyses was very limited, and an agency’s certification decision could not be challenged in court.”<sup>26</sup>

While RFA created a basic analytical lens and framework through which to consider Federal policy impacts on small businesses, the 1996 Act sought to alter the policymaking structure whereby small businesses would have a more robust voice in the process, for example, through establishment of “small business advocacy review panels” (so-called SBREFA panels).<sup>27</sup> It also included a requirement that agencies, when they are required to publish a final regulatory flexibility analysis, develop a “compliance guide” for each rule (or group of related rules) which explain to small entities how to comply. It also included judicial review for some agency actions under the RFA in order to improve agency compliance. Unfortunately, even these later “changes have had only a modest effect on agency compliance with regulatory flexibility requirements.”<sup>28</sup> As a witness at a recent Senate hearing put it:

<sup>20</sup> *Id.*, at Sec. 2(b). Here “organizations” refers to not-for-profit enterprises.

<sup>21</sup> 5 U.S.C. § 603.

<sup>22</sup> *Id.* at § 602.

<sup>23</sup> *Id.* at § 609.

<sup>24</sup> *Id.* at § 612.

<sup>25</sup> Contract with America Advancement Act of 1996, Pub. L. No. 104–121, 110 Stat. 847, amended by U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110–28, 121 Stat. 112.

<sup>26</sup> H.R. Rep. 114–12, pt. 1, at 4 (2015), citing *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *Colo. State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 948 (10th Cir. 1991); *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1520 (E.D. Pa. 1986), *aff’d* on other grounds, 829 F.2d 409 (3d Cir. 1987).

<sup>27</sup> *Id.* at § 244.

<sup>28</sup> *Id.* citing Sarah E. Shive, *If You’ve Always Done It That Way, It’s Probably Wrong: How the Regulatory Flexibility Act Has Failed To Change Agency Behavior, and How Congress Can Fix It*, 1 ENTREPRENEURIAL BUS. L.J. 153, 164 (2006) (“[W]hile one Department of Labor official noted that the judicial review permitted by the SBREFA would likely result in a ‘significant impact,’ judges have rarely ruled in favor of small businesses, granting substantial deference to agencies in all but the most egregious of cases.”); Christopher M. Grengs, *Making the Unseen Seen: Issues and Options in Small Business Regulatory Reform*, 85 MINN. L. REV. 1957, 1973 (June 2001) (“Some observers expressed high optimism about SBREFA’s prospects for holding Federal agencies more accountable for their treatment of small businesses. Although this optimism was perhaps not entirely deserved, SBREFA has spurred moderate progress in improving the regulatory treatment of small businesses. In particular, since SBREFA’s enactment in 1996, judicial review of Federal agency action under SBREFA has proved to be a promising lynchpin

While the Regulatory Flexibility Act requires agencies to consider the effect of their actions on small entities, agencies regularly neglect input from the regulated community and, as a result, produce very poor analysis. Even with these flaws, the rules go into place and businesses are forced to divert precious resources to lengthy and uncertain legal challenges. Unfortunately there is no other way to hold agencies accountable when they ignore the effects of regulation on small businesses, and agencies are not required to confirm their economic analysis with a respected, neutral third party.<sup>29</sup>

Another Congressional hearing witness put it thusly:

While the original Congressional intent and subsequent additions/enhancements to the Regulatory Flexibility Act (RFA) are to be lauded, the reality is that far too often agencies either view compliance with the Act as little more than a procedural “check-the-box” exercise or they artfully avoid compliance by other means.<sup>30</sup>

SBRFIA seeks to strengthen the framework established in RFA and the Small Business Regulatory Enforcement Fairness Act while also narrowing avenues for agencies to *de facto* or even explicitly avoid those acts’ requirements. It does this in part by providing more clarity through expanded definitions where previously these were subject to agency’s own interpretation, providing for expanded judicial review of agency compliance with RFA requirements, and expanded authorities for the SBA’s Office of Advocacy. The overall effect is to drive regulatory agencies toward a process and analysis which meaningfully accounts for—and to the extent possible accommodates—the impact on small entities before finalizing a rule.

### III. LEGISLATIVE HISTORY

Senator James Lankford (R-OK) introduced S. 584 on March 8, 2017, with Senators James E. Risch (R-ID) and Chuck Grassley (R-IA). Senators Orrin G. Hatch (R-UT), John Hoeven (R-ND), and Pat Roberts (R-KS) later joined as cosponsors. The bill was re-

for remedying irrational or glaringly mistaken agency action.”); Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power Over Federal Regulatory Agencies*, 41 WM. & MARY L. REV. 1425, 1426, 1461 (Apr. 2000) (“A review of existing case law demonstrates that small entities have prevailed using SBREFA in cases in which there was a gross violation of Federal rulemaking procedures by an agency, but failed when using SBREFA in cases in which the agency made some effort to comply with those requirements . . . . The SBREFA amendments succeed in refining the requirements of the RFA and, in particular, the judicial review provision grants small businesses a weapon to insure that Federal agencies comply with the RFA. Judicial deference to agency decisions, however, limits the power of judicial review. In the end, true regulatory relief depends upon the agencies’ own commitment to fairness and balance for the small businesses they regulate.”).

<sup>29</sup> *Examining How Small Businesses Confront and Shape Regulations: Hearing Before the S. Comm. on Small Bus. and Entrepreneurship*, 115th Cong., 115–21 (2017) (testimony of Randy Noel) (“Under the RFA and subsequent amendments of the SBRFA, an agency may certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. This allows the agency to skip the SBREFA requirements. Unfortunately there is no check on whether the agency certification of no impact on small businesses is correct. Increasingly, agencies have improperly claimed that small businesses were not affected by their proposed rule, even when that clearly was not the case.”) (emphasis added).

<sup>30</sup> *Hearing on H.R. 2542 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 113–29 (2013) (statement of Carl Harris).



ferred to the Committee on Homeland Security and Governmental Affairs. The Committee considered S. 584 at a May 17, 2017 business meeting.

The Committee ordered S. 584 reported favorably on May 17, 2017, by a roll call vote of 8 yeas to 6 nays. Senators voting in the affirmative were Johnson, McCain, Portman, Paul, Lankford, Enzi, Hoeven, and Daines. Senators voting in the negative were McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris. For the record only, Senator Carper voted nay by proxy. Consistent with Committee Rule 11, the Committee reports the bill with a technical amendment by mutual agreement of the Chairman and Ranking Member.

#### IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

##### *Section 1. Short title*

This section provides the bill's short title, the "Small Business Regulatory Flexibility Improvements Act."

##### *Section 2. Clarification and expansion of rules covered by the Regulatory Flexibility Act*

This section clarifies and expands the rules covered by the Regulatory Flexibility Act by amending Section 601 of title 5 of the United States Code. This section defines "economic impact" as any direct or indirect economic effect on small entities; defines "land management plan" to mean any plan developed by the Secretary of Agriculture under the Forest and Rangeland Renewable Resources Planning Act of 1974 or Section 202 of the Federal Land Policy and Management Act of 1976; defines "revision" and "amendment;" defines "small organization" pursuant to a size standard established by the Administrator of the Small Business Administration for entities described by the North American Industrial Classification System or, if this is not available, as any entity whose net worth does not exceed \$7,000,000 and 500 employees.

##### *Section 3. Expansion of report of regulatory agenda*

This section requires that the SBA describe which sector of the North American Industrial Classification System is primarily affected by any rule proposed by the agency that is likely to have a significant economic impact on small entities. Furthermore, within three days after an agency publishes a regulatory flexibility agenda, it must publicize a plain language summary of the agenda on its website. The SBA must also publish on its website a plain language summary of each regulatory flexibility agenda within three days of their publication in the Federal Register.

##### *Section 4. Requirements providing for more detailed analyses*

This section lays out the requirements for what must be included in a regulatory flexibility analysis. These analyses must include (1) a description of the reasons the action is being considered, (2) a description of the proposed rule's objectives and legal basis, (3) an estimate of the number and type of small entities the rule will apply to, (4) a description of the compliance requirements of the proposed rule, (5) a description of all potentially duplicate, overlapping, or conflicting federal rules, (6) an estimate of the added economic bur-

den of the rule on small entities, (7) a description of any disproportionate impact on small entities or a specific class thereof, and (8) a description of any hindrance on small entity's ability to have access to credit. An agency may satisfy these requirements by cross-referencing to a specific portion of another agenda required by law which meets these stipulations. The agency shall also publish the final regulatory flexibility analysis available on its website and in the Federal Register. The agency shall further provide a quantifiable description of the impacts of the proposed rule or a statement as to why the effects are not quantifiable. This section also includes changes to the syntax of 5 U.S.C. 604(a) and 605(b).

*Section 5. Repeal of waiver and delay authority; additional powers of the Chief Counsel for Advocacy*

This section mandates that Chief Counsel for Advocacy of the SBA, after taking public comment, issue rules within 270 days of enactment of this bill to govern agency compliance with the Regulatory Flexibility Act, and these rules cannot be altered without the Chief Counsel's consultation. It further empowers the Chief Counsel to intervene in any agency adjudication and to file comments in response to any agency notice requesting a statement.

*Section 6. Procedures for gathering comments*

This section requires that an agency, prior to making a rule, must provide the Chief Counsel for Advocacy of the SBA with (1) all materials prepared and utilized by the agency in making the proposed rule, (2) information on the potential economic effects of the proposed rule. Within 15 days of receiving these materials, the Chief Counsel must (1) identify the small entities from whom to solicit input about the potential economic impact of the proposed rule and (2) convene a review panel to review these materials consisting of an employee from the SBA Office of Advocacy, an employee from the agency making the rule and, in the case of an agency other than an independent regulatory agency, an employee from the Office of Information and Regulatory Affairs of OMB. Within 60 days of this committee being convened, the Chief Counsel shall submit a report to the agency including an assessment of the economic impact of the proposed rule and this report shall become part of the rule making record. This section applies to a proposed rule if (1) its annual effect on the economy is \$100,000,000 or more, (2) it creates a major increase in costs or prices for consumers, industry, or the government (3) it results in significant adverse effects on competition, employment, investment, productivity, innovation, or the ability for American enterprises to compete in domestic markets, or (4) it results in a significant economic impact on a substantial number of small entities. The Chief Counsel can waive these reporting requirements if he or she determines that compliance is impracticable, unnecessary, or contrary to the public interest. A small entity may request that the agency provide it with all of the documentation discussed in this subsection which will be delivered to the entity within ten days.

*Section 7. Periodic review of rules*

This section requires that, within 180 days, each agency must publish in the Federal Register and place on its website a plan for

the periodic review of rules issued by the agency which the agency head determines have a significant economic impact to a substantial number of small entities. The purpose of the review is to determine whether rules should be continued, amended, or rescinded. The plan shall provide for the review of all such agency rules currently existing within ten years of the publication of the plan. If the agency head deems this unfeasible, he or she will certify this in a statement published in the Federal Register and may extend the review for no longer than two years. The plan shall include details on how the agency will include small businesses in the process. Agencies shall amend or rescind rules to minimize any adverse significant economic impact on a substantial number of small entities. Each agency must submit an annual report with the results of this review process and each year, each agency must publish on its website a list of the rules to be reviewed.

*Section 8. Judicial review of compliance with the requirements of the Regulatory Flexibility Act available after publication of the final rule*

This section contains syntax changes for 5 U.S.C. § 611(a) and 5 U.S.C. § 612(b).

*Section 9. Jurisdiction of court of appeals over rules implementing the Regulatory Flexibility Act*

This section contains syntax changes for 28 U.S.C. § 2342, 28 U.S.C. § 2341(3), and 5 U.S.C. § 612(b).

*Section 10. Establishment and approval of small business concern size standards by Chief Counsel for Advocacy*

This section establishes that the SBA Administrator may specify standards by which a business concern can be determined to be a small business concern for the purposes of this legislation. This section further specifies that in the case of an action for judicial review of a rule which includes definitions or standards approved by the Chief Counsel, the party seeking such a review shall be entitled to join as a party in the action.

*Section 11. Clerical Amendments*

This section contains clerical edits to 5 U.S.C. § 601, 5 U.S.C. § 605, 5 U.S.C. § 607, 5 U.S.C. § 608, 5 U.S.C. § 603(d), and 5 U.S.C. § 604(a).

*Section 12. Agency preparation of guides*

This section requires SBA to use sufficiently plain language in guides for affected small entities. The SBA shall solicit input from these entities when developing guides.

*Section 13. Comptroller General report*

This section requires the Comptroller General of the United States to publish a study within 90 days examining whether the Chief Counsel of the SBA has the resources to carry out that office's duties under this act.

*Section 14. Waiver of fines for first-time paperwork violations by small businesses*

This section edits the procedure for fining a small business for a first-time paperwork violation. A violation is a first-time violation if the small business has not previously violated any similar requirement by the same agency within five years. The head of the agency will not impose a fine on a small business for a first-time violation. This policy may be excepted if the agency head determines that (1) the violation can cause serious harm to the public interest, (2) failing to impose a fine would impede with the detection of criminal activity, (3) the violation is tax-related, (4) the violation was not corrected on or before the 6-month anniversary of being notified of their noncompliance, or (5) the violation presents a danger to public health or safety. In the case of a danger to public health and safety, the agency head may choose not to impose a fine if the concern is corrected within 24 hours. To determine whether to waive a fine in these cases, the agency head shall consider all of the facts including (1) the nature and seriousness of the violation, (2) whether the small business has made a good faith effort to comply, and (3) whether the small business has obtained a significant economic benefit from the violation. Should the agency head not decide to allow the small business 24 hours to correct the violation and avoid a fine, the agency head shall notify congress regarding this determination within 60 days of the imposition of the fine.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, August 18, 2017.*

Hon. RON JOHNSON,  
*Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 584, the Small Business Regulatory Flexibility Improvements Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL,  
*Director.*

Enclosure.

*S. 584—Small Business Regulatory Flexibility Improvements Act*

Summary: S. 584 would amend the Regulatory Flexibility Act (RFA) to expand the number of rules covered by that act and to require agencies to perform additional analysis of regulations that affect small businesses. The legislation also would provide new authorities to the Small Business Administration's (SBA's) Office of Advocacy to intervene and provide support for agency rulemaking. Finally, S. 584 would require the Government Accountability Office (GAO) to report on the implementation of the bill.

CBO estimates that implementing S. 584 would cost \$65 million over the 2017–2022 period, assuming appropriation of the necessary funds. Enacting the bill could affect direct spending by agencies not funded through annual appropriations and would waive certain fines, which are recorded as revenues; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any changes in direct spending and revenues would not be significant.

CBO estimates that enacting S. 584 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 584 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

If any federal agencies increase mandatory fees to offset the costs of implementing the additional analysis required by the bill, S. 584 would increase the cost of an existing mandate on private entities to pay those fees. CBO expects that if fees are increased as a result of the bill, the additional cost of the mandate would fall well below the annual threshold established in UMRA for private-sector mandates (\$156 million in 2017, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary effect of S. 584 is shown in the following table. The costs of this legislation fall within budget functions 370 (commerce and housing credit), 800 (general government), and all budget functions that include funding for agencies that issue regulations affecting small businesses.

	By fiscal year, in millions of dollars—						
	2017	2018	2019	2020	2021	2022	2017– 2022
INCREASES IN SPENDING SUBJECT TO APPROPRIATION							
Estimated Authorization Level .....	0	10	15	15	15	15	70
Estimated Outlays .....	0	7	13	15	15	15	65

Basis of Estimate: For this estimate, CBO assumes that the legislation will be enacted near the beginning of fiscal year 2017, that the necessary amounts will be appropriated each year, and that spending will follow historical patterns for similar activities.

CBO is unaware of any comprehensive information on the current level of spending for regulatory activities governmentwide. However, according to the Congressional Research Service, federal agencies issue 3,000 to 4,000 final rules each year. The Departments of Transportation, Homeland Security, and Commerce, and the Environmental Protection Agency (EPA) issue the most rules. Most major rules (those with an estimated economic impact on the economy of more than \$100 million per year) are issued by the De-

partments of Health and Human Services and Agriculture and the EPA.

S. 584 would broaden the definition of a “rule” for rulemaking purposes to include agency guidance and policy statements. The bill also would expand the scope of the regulatory analysis for proposed and final rules to include an examination of indirect economic effects on small businesses and a more detailed analysis of the possible economic consequences of the rule for small businesses. The legislation defines indirect economic effects as any effect that is reasonably foreseeable and would require agencies to prepare reports on the cumulative economic impact on small businesses of new and existing regulations.

Implementing S. 584 would increase the amount of regulatory analysis that agencies would need to prepare, and it would expand the role of the SBA’s Office of Advocacy and the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget in the rulemaking process. Finally, the legislation would require more federal agencies to use panels of experts to evaluate regulations and to prepare reports on the economic impact of proposed regulations on small business.

Information from OIRA, the SBA, and some federal agencies indicates that the new requirements would increase the cost to issue a few hundred of the thousands of federal regulations issued annually. Based on an analysis of that information, CBO estimates that administrative costs of some regulatory agencies, the SBA and OIRA would eventually increase by a total of about \$15 million annually. That amount would cover approximately 60 new employees at the SBA and OIRA as well as additional administrative expenses for several other agencies. We expect that it would take about two years to reach that level of effort. The GAO report on the effect of the legislation on the Office of Advocacy would cost less than \$500,000 to complete. Additional spending would be subject to the availability of appropriated funds.

**Pay-As-You-Go considerations:** The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Pay-as-you-go procedures apply because enacting S. 584 could affect direct spending by agencies not funded through annual appropriations and would decrease revenues by waiving certain fines. CBO estimates, however, that any net increase in direct spending by those agencies and the loss of revenues from the waving of fines would not be significant.

**Increase in long-term net direct spending and deficits:** CBO estimates S. 584 would not increase net direct spending or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2028.

**Intergovernmental and private sector impact:** S. 584 contains no intergovernmental mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

If any federal agencies increase mandatory fees to offset the costs of implementing the additional analysis required by the bill, S. 584 would increase the cost of an existing mandate on private entities to pay those fees. CBO expects that if such mandatory fees are increased as a result of the bill, the additional cost of the mandate in any one year would fall well below the annual threshold estab-

lished in UMRA for private-sector mandates (\$156 million in 2017, adjusted annually for inflation).

Estimate prepared by: Federal Spending: Matthew Pickford and Stephen Rabent; Impact on state, local, and tribal governments: Zach Byrum; Impact on the private sector: Paige Piper/Bach.

Estimate approved by: H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

## VII. MINORITY VIEWS

### MINORITY VIEWS OF SENATORS CLAIRE McCASKILL, THOMAS R. CARPER, AND GARY C. PETERS

Small businesses are the backbone of American communities. They are the local car dealership, laundromat, and favorite family restaurant. Small businesses are critical to creating jobs and driving economic growth. That is why, when Congress considers legislation it should always be our goal to consider the impact on small businesses, and ensure a level playing field so small businesses have the opportunity to thrive. Unfortunately, the Small Business Regulatory Flexibility Improvements Act of 2017 (SBRFIA) does not meet that standard. This bill will introduce more uncertainty into the regulatory process and make it more difficult to create that level playing field.

Contrary to the rhetoric often heard, most small businesses are not opposed to all forms of regulation. According to polling conducted by Small Business Majority, nearly eight in ten small employers agree regulations are important. These business owners believe that regulations protect small businesses from unfair competition and level the playing field with big businesses so they can compete. The same poll found that 86% of small employers feel that certain government regulations play an important role and are necessary for a modern economy.<sup>1</sup> These polls are significant since the Small Business Office of Advocacy finds that over 99% of all businesses qualify as small businesses (using the basic Advocacy definition of a small business being any business entity with less than 500 employees).<sup>2</sup>

The focus of SBRFIA is to make changes and expand upon the rulemaking and analytical requirements developed under the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). The majority's committee report states that SBRFIA seeks to strengthen the RFA framework while narrowing the ability of agencies to inappropriately avoid these requirements. Further, the report argues that SBRFIA drives regulatory agencies toward a process where agencies meaningfully account for and, to the extent possible, accommodate small entities when analyzing the impacts of rules.<sup>3</sup>

Unfortunately, in an attempt to accomplish those laudable goals, SBRFIA injects vagueness and overly broad requirements into a

<sup>1</sup>*Improving Small Business Input on Federal Regulations: Ideas for Congress and a New Administration*: Hearing Before the Subcommittee on Regulatory Affairs and Federal Management, 115th Cong. Jan. 19, 2017 (testimony of LaJuanna Russell).

<sup>2</sup>"Frequently Asked Questions About Small Business," Small Business Office of Advocacy, <https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf>

<sup>3</sup>*Supra*, pt. 2



well-understood statute. The net result is uncertainty for small businesses, and eventually harm to those small businesses as the regulatory process becomes unable to effectively meet their needs.

Agencies should always comply with the RFA when developing rules, and agencies that incorrectly waive RFA requirements if a rule does have a significant impact on a significant number of small entities should be held accountable for their actions. In fact, there are already substantial incentives for agencies to properly certify rules. Entities that believe an agency has improperly certified a rule, waiving RFA requirements, can challenge the certification in federal court.<sup>4</sup> This provides the necessary check on agency actions and helps ensure RFA compliance.

*The importance of benefits in the rulemaking process*

In order to actually improve outcomes for small businesses, reforms to the rulemaking process must take into account the benefits of regulations in addition to the costs. While it is easy to focus on the costs of regulations, the benefits are just as important, since the benefits are the foundational rationale behind requiring a group to incur any regulatory costs at all. Accounting for the benefits of a regulation has been enshrined in the regulatory process since President Reagan issued Executive Order 12291 in 1981<sup>5</sup> and the importance of benefits in regulatory process was further solidified when Executive Order 12866 was issued in 1993,<sup>6</sup> that executive order that has been reaffirmed and kept in effect by both Democratic and Republican presidents. To focus on costs without giving equal consideration to the benefits provided, as this legislation does, is shortsighted and harmful to small businesses.

Furthermore, the benefits should not be thought of as a redistribution of power, but as a reduction of societal costs—such as ensuring that a parent has a safe workplace or is protected from exposure to hazardous chemicals. A serious workplace injury to a parent who is unable to care for a young child creates immeasurable harm to the family, but it also means potentially significant societal burdens as well—children may end up in foster care, or families may lose their only income and be forced to rely on welfare benefits. These types of regulatory benefits demonstrate the effectiveness of regulations that mitigate the unavoidable risks our society encounters every day. Throughout SBRFIA, there is an emphasis on costs over benefits, which will hurt small businesses and the entire regulatory process.

Any reform of the rulemaking process must also consider the time it takes to promulgate a regulation. The rulemaking process is now more time consuming than ever before, and Administrative Law experts have been sounding the alarm for years—with estimated promulgation times for significant regulations taking up to eight years, in a best case scenario.<sup>7</sup>

Of the alterations SBRFIA makes to the federal regulatory process, there are a number of concerns that deserve closer examina-

<sup>4</sup> 5 U.S.C. 605(b).

<sup>5</sup> Exec. Order No. 12291, 46 C.F.R. 13193 (Feb. 17, 1981).

<sup>6</sup> Exec. Order No. 12866, 58 C.F.R. 51735 (Sept. 20, 1993).

<sup>7</sup> See e.g. Shapiro, S., *The Regulatory Accountability Act of 2011: Way Too Much of a Good Thing*, Administrative & Regulatory Law News, 37(3), 10–11 (2012).

tion, including the expansion of the definition of what constitutes a rule, the true impact of analyzing indirect effects, providing excessive authority to the Small Business Office of Advocacy, the impact on public health and safety of waiving certain paperwork requirements, and unnecessary analytical requirements that will not improve regulations. These five subjects do not represent the sum total of the concerns with SBRFIA but do represent some of the most critical problems that need to be addressed.

*S. 584 Creates an overly-broad definition of covered rules*

Under the SBRFIA definition of “rules,” direct final and interim final rules would be subject to the expanded RFA requirements, a significant change from current law. Most often these types of rule-making processes are utilized in emergency situations, to protect public health and safety, and during routine and noncontroversial rulemakings. They are important tools that aid agencies in many situations and help protect the public, and they are used in situations in which compliance with the RFA would do nothing more than waste scarce resources.<sup>8</sup> SBRFIA also repeals the ability of agencies to waive applicable RFA requirements when responding to an emergency or when it would otherwise be impracticable.<sup>9</sup>

Additionally, SBRFIA would require many agency guidance documents to go through the expanded RFA analytical requirements—including, for the first time, documents that do not have the force and effect of law since they are not regulations.<sup>10</sup> Agencies use guidance documents to clarify the meaning of regulations, and businesses rely on these documents, and the fast issuance of these documents, to ensure compliance with complex regulations. Guidance can be used by both the regulators and regulated to ensure that all parties understand the requirements and responsibilities spelled out in regulatory text. SBRFIA’s departure from current practice would inevitably cause significant delays in the issuance of guidance, leading to less certainty for businesses.

In addition, agency guidance documents are already regularly examined by the courts, and when these texts are found to create additional burdens beyond those examined in the underlying regulation, the action is struck down.<sup>11</sup> As such, codifying the additional RFA requirements in this bill would add uncertainty without adding additional oversight.

Taken together, these changes to current law regarding direct and interim final rules and guidance documents will significantly hamper an agency’s ability to respond to emergency situations and put a strain on agency resources. By requiring that agencies complete a lengthy RFA analysis, even when using these common-sense, well-understood and accepted rulemaking procedures, agencies will likely abandon these practices and, at best, needlessly subject the American people to lengthened rulemaking and public risks.

<sup>8</sup> *Section-by-Section Analysis, S. 584, the Small Business Regulatory Flexibility Improvement Act of 2017*, Center for Progressive Reform (hereinafter “CPR Analysis”).

<sup>9</sup> S. 584, Sec. 2.

<sup>10</sup> CPR Analysis.

<sup>11</sup> *Agric. Retailers Ass’n v. U.S. Dep’t of Labor & OSHA*, 837 F.3d 60, 2016; *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015).

*S. 584 requires unbalanced analysis of indirect economic effects*

SBRFIA's requirement to expand regulatory analysis to include the indirect effects of regulation on small entities represents a significant increase in the number of regulations subject to the analytical requirements under the RFA, and could potentially result in every regulation being subject to the RFA. The bill does not clearly define "indirect effects," saying only that the indirect effect should be "reasonably foreseeable and results from such rule (without regard to whether small entities will be directly regulated by the rule)."<sup>12</sup> Under such a wide definition, even rules with only very minor indirect impacts on small entities would have to complete the same analytical analysis as rules with significant impact on small entities. Since it was first enacted, and through several legislative updates, the RFA was specifically designed and targeted at the rules which had the most significant direct impact on small entities.<sup>13</sup> By changing this standard, the original purpose of the RFA is lost.

Requiring so many additional rules to undergo such scrutiny also threatens the quality of all regulatory actions. A situation may very easily arise where agencies simply do not receive the resources necessary to perform the required analysis with the attention to detail required under this bill. Even with additional appropriations to the agencies, such detailed requirements will continue to elongate an already backlogged process. This will undoubtedly create additional delays which will further risk the public health and safety, as well as a level playing field for small businesses, within our Nation.

It is also notable that the bill actually refers to "indirect economic effect" rather than "indirect effects." This is nothing more than an attack on the fair consideration of both the costs *and* benefits of a proposed rule. Benefits, by their nature, are not as easily quantifiable as costs to the regulated entities, and many benefits are not 100 percent economic in nature. Under this bill's requirement, it is not difficult to see how agencies will be bound to consider regulatory costs at a higher rate than the benefits to society. As we already discussed, consideration of benefits in regulatory analysis is critical to understanding the true impact of a rule, and just looking at economic impacts presents an incomplete analysis.

*S. 584 provides excessive authority to the Office of Advocacy*

SBRFIA gives wide-ranging authority to the Small Business Office of Advocacy (Advocacy) to develop regulations regarding agency implementation of the RFA, as amended by SBRFIA. This would give Advocacy significant authority over rulemaking of every federal agency, since potentially every rule would be impacted by the RFA. It is not clear that Advocacy wishes to have such authority, nor is it clear that giving it such authority would improve regulatory outcomes for small businesses. Recent actions taken by Advocacy have created doubt in the decision-making ability and objectivity of the Office. Advocacy recently chose to award an important research contract to individuals who developed a previous report

<sup>12</sup>S. 584, Sec. 2.

<sup>13</sup>S. Rpt. 96-878 to accompany S. 299, which was signed into law as P.L. 96-354 (1980).

for Advocacy that was debunked and eventually disclaimed by Advocacy because it significantly overstated the costs of regulations.<sup>14</sup> That Advocacy would choose to pursue another critical regulatory analysis research effort with the same individuals who previously produced a widely debunked report<sup>15</sup> gives rise to concerns about Advocacy's judgement and ability to oversee regulatory activity across the federal government.

*S. 584 weakens enforcement of public health and safety requirements*

SBRFIA also weakens public health and safety requirements by amending the Paperwork Reduction Act (PRA) and creating a requirement that agencies waive fines for a significant number of paperwork violations. The definition of paperwork violations under the PRA is broad and captures a significant number of record-keeping and reporting requirements, as well as disclosures to third parties.<sup>16</sup> For example, consider all of the safety requirements of the asbestos standard in construction and the provisions requiring the environmental monitoring of exposures, the medical examinations of workers, the communication of employers, and the training of workers. Those requirements would be deemed paperwork under SBRFIA and could therefore be waived, as could similar requirements.<sup>17</sup> Agencies have considerable flexibility to waive paperwork requirements for small businesses. For example, as part of the Small Business Paperwork Relief Act of 2002, agencies can aggressively seek out ways to reduce burdens for the smallest businesses, those with fewer than 25 employees.<sup>18</sup> However, SBRFIA eliminates much of that flexibility and undermines agencies' efforts to protect public health and safety.

These paperwork violations also cannot be accurately defined as "first-time" violations since the legislative language actually states that a business is eligible for a waiver if they have not committed a similar violation in the past five years.<sup>19</sup> Even if a violation occurred more than five years ago, a responsible business should take steps to comply with the requirements, and waiving these requirements removes an important incentive for businesses to do so.

*S. 584 creates unnecessary analytical requirements*

Throughout, SBRFIA features an expansion of analytical requirements under the RFA. For example, it adds the term "detailed" to several requirements<sup>20</sup> but invites uncertainty by offering no explanation what constitutes a detailed analysis. While such a change may seem inconsequential, inside the courtroom legislative word choice matters and can have lasting impacts.<sup>21</sup> SBRFIA re-

<sup>14</sup>"Backlash to SBA Regulatory Research Contract Is Growing", Bloomberg BNA, By Cheryl Bolen, Nov. 2, 2017; and "Controversial Research Contract Faces Possible Bid Protest," Bloomberg BNA, By Cheryl Bolen, Nov. 9, 2017.

<sup>15</sup><https://www.sba.gov/advocacy/impact-regulatory-costs-small-firms>.

<sup>16</sup>CPR Analysis.

<sup>17</sup>Asbestos in Construction Standard (29 CFR 1926.1101) (1218-0134), U.S. Department of Labor, Occupational Safety and Health Administration, August 2016.

<sup>18</sup>5 U.S.C. 3506.

<sup>19</sup>S. 584, Sec. 14.

<sup>20</sup>*Id.*

<sup>21</sup>Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, *The Unfunded Mandates Reform Act: Opportunities*

quires consideration of the “cumulative economic impact,” and “disproportionate economic impacts” such overly broad terms could very easily lead to additional rulemaking delays and highly speculative analysis. Taken as a whole, these requirements lead to what some have referred to as “paralysis by analysis,” causing harm to businesses and families alike.

### *Conclusion*

Finally, we note that SBRFIA misses sufficient consideration of key concepts that should be in any legislative update of the RFA. First, the bill makes no provision regarding how to provide agencies additional resources or capabilities to produce the additional analysis called for in the bill. Further, the bill does not provide enough focus or direction to agencies regarding additional compliance assistance for small entities. As noted earlier, small entities see the value in regulations that level the playing field.<sup>22</sup>

It should be our goal to have an effective, and transparent regulatory process, and to ensure that process results in common-sense regulations, which are promulgated in a timely fashion, protect public health and safety, and maximize benefits. We remain open to considering legislation that will actually improve regulatory outcomes for small businesses, and we look forward to such efforts in the future. However, we do not believe this bill would improve the regulatory process, and the superfluous analytical requirements would slow down an already slow process without improving outcomes. For these reasons we oppose S. 584 and urge our colleagues to join us in opposition.

### VIII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 584 as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

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*for Improvement to Support State and Local Governments*. 114th Cong. (Feb. 24, 2016) (S. Hrg. 114–266).

<sup>22</sup> Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, *Improving Small Business Input on Federal Regulations: Ideas for Congress and a New Administration*, Testimony of LaJuanna Russell, 115th Cong (Jan. 19, 2017).

# UNITED STATES CODE

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## TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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### PART I—THE AGENCIES GENERALLY

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#### CHAPTER 6—THE ANALYSIS OF REGULATORY FUNCTIONS

Sec.

601. Definitions.

602. Regulatory agenda.

603. Initial regulatory flexibility analysis.

604. Final regulatory flexibility analysis.

605. **[Avoidance of duplicative or unnecessary analyses.]** *Incorporations by reference and certifications.*

606. Effect on other law.

607. **[Preparation of analyses.]** *Quantification requirements.*

608. **[Procedure for waiver or delay of completion.]** *Additional powers of Chief Counsel for Advocacy.*

609. Procedures for gathering comments.

610. Periodic review of rules.

611. Judicial review.

612. Reports and intervention rights.

#### SEC. 601. DEFINITIONS.

\* \* \* \* \*

**[(1) the term]**(1) *AGENCY.*—*The term “agency” means an agency as defined in section 551(1) of this title[;].*

(2) *RULE.*—*The term “rule”—*

*(A) has the meaning given the term in section 551(4); and*

*(B) does not include—*

*(i) a rule pertaining to the protection of the rights of and benefits for veterans or part 232 of title 32, Code of Federal Regulations (as in effect on July 1, 2014), or any successor provisions thereto; or*

*(ii) a rule of particular (and not general) applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances.*

(3) the term “small business” has the same meaning as the term “small business concern” under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities

of the agency and publishes such definition(s) in the Federal Register[;].

(4) [the term “small organization” means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;] *SMALL ORGANIZATION.*—

(A) *IN GENERAL.*—*The term “small organization” means any nonprofit enterprise which, as of the issuance of a notice of proposed rule making—*

(i) *in the case of an enterprise which is described by a classification code of the North American Industrial Classification System, does not exceed the size standard established by the Administrator of the Small Business Administration pursuant to section 3 of the Small Business Act (15 U.S.C. 632) for small business concerns described by such classification code; and*

(ii) *in the case of any other enterprise, has a net worth that does not exceed \$7,000,000 and has not more than 500 employees.*

(B) *LOCAL LABOR ORGANIZATIONS.*—*In the case of any local labor organization, subparagraph (A) shall be applied without regard to any national or international organization of which such local labor organization is a part.*

(C) *AGENCY DEFINITIONS.*—*Subparagraphs (A) and (B) shall not apply to the extent that an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions for such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register.*

[(5) the term] (5) *SMALL GOVERNMENTAL JURISDICTION.*—*The term “small governmental jurisdiction” means governments of cities, counties, towns, townships, villages, school districts, or special districts, and tribal organizations (as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304(l))), with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register[;].*

[(6) the term] (6) *SMALL ENTITY.*—*The term “small entity” shall have the same meaning as the terms “small business”, “small organization”, and “small governmental jurisdiction” defined in paragraphs (3), (4) and (5) of this section[; and].*

(7) [the term “collection of information”—

[(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the

public, of facts or opinions by or for an agency, regardless of form or format, calling for either—

[(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

[(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.]

*COLLECTION OF INFORMATION.*—The term “collection of information” has the meaning given the term in section 3502 of title 44.

(8) *RECORDKEEPING REQUIREMENT.*—The term “record-keeping requirement” [means a requirement imposed by an agency on persons to maintain specified records.] *has the meaning given the term in section 3502 of title 44.*

(9) *ECONOMIC IMPACT.*—The term “economic impact” means, with respect to a proposed or final rule—

(A) any direct economic effect on small entities of such rule; and

(B) any indirect economic effect (including compliance costs and effects on revenue) on small entities which is reasonably foreseeable and results from such rule (without regard to whether small entities will be directly regulated by the rule).

(10) *LAND MANAGEMENT PLAN.*—

(A) *IN GENERAL.*—The term “land management plan” means—

(i) any plan developed by the Secretary of Agriculture under section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604); and

(ii) any plan developed by the Secretary of the Interior under section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712).

(B) *REVISION.*—The term “revision” means any change to a land management plan which—

(i) in the case of a plan described in subparagraph (A)(i), is made under section 6(f)(5) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)); or

(ii) in the case of a plan described in subparagraph (A)(ii), is made under section 1610. Of title 43, Code of Federal Regulations (or any successor regulation).

(C) *AMENDMENT.*—The term “amendment” means any change to a land management plan which—

(i) in the case of a plan described in subparagraph (A)(i), is made under section 6(f)(4) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(4)) and with respect to which the Secretary of Agriculture prepares a statement described



in section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)); or

(ii) in the case of a plan described in subparagraph (A)(ii), is made under section 1610.5–5 of title 43, Code of Federal Regulations (or any successor regulation), and with respect to which the Secretary of the Interior prepares a statement described in section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

\* \* \* \* \*

## Small Business Regulatory Fairness Act of 1996

\* \* \* \* \*

### SEC. 212. COMPLIANCE GUIDES.

(a) \* \* \*

(1) \* \* \*

\* \* \* \* \*

(5) **[AGENCY PREPARATION OF GUIDES.—]**AGENCY PREPARATION OF GUIDES.—The agency shall, in its sole discretion, taking into account the subject matter of the rule and the language of relevant statutes, ensure that the guide is written using sufficiently plain language likely to be understood by affected small entities. Agencies may prepare separate guides covering groups or classes of similarly affected small entities and may cooperate with associations of small entities to **[develop and]** distribute such guides. *In developing guides, agencies shall solicit input from affected small entities or associations of affected small entities.* An agency may prepare guides and apply this section with respect to a rule or a group of related rules.

\* \* \* \* \*

### SEC. 602. REGULATORY AGENDA.

(a) \* \* \*

(1) \* \* \*

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking**[, and]**;

(3) *a brief description of the sector of the North American Industrial Classification System that is primarily affected by any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities; and*

**[(3)]** (4) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) \* \* \*

[(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.]

(c)(1) *Not later than 3 days after the date on which an agency publishes a regulatory flexibility agenda in the Federal Register under subsection (a), the agency shall prominently display on the website of the agency a plain language summary of the information contained in the regulatory flexibility agenda.*

(2) *The Office of Advocacy of the Small Business Administration shall compile, by agency, and prominently display on the website of the Small Business Administration a plain language summary of each regulatory flexibility agenda published under subsection (a) not later than 3 days after the date of publication in the Federal Register.*

#### **SEC. 603. INITIAL REGULATORY FLEXIBILITY ANALYSIS.**

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement[.] *or a recordkeeping requirement, and without regard to whether such requirement is imposed by statute or regulation.*

(b) Each initial regulatory flexibility analysis required under this section shall contain[—] *a detailed statement—*

(1) [a description of the reasons why action by the agency is being considered;] *describing the reasons why action by the agency is being considered;*

(2) [a succinct statement of the objectives of, and legal basis for, the proposed rule;] *describing the objectives of, and legal basis for, the proposed rule;*

(3) [a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;] *estimating the number and type of small entities to which the proposed rule will apply;*

(4) [a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;] *describing the projected reporting, recordkeeping, and other com-*

*pliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirements and the type of professional skills necessary for preparation of the report and record;*

(5) *【an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.】 describing all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule, or the reasons why such a description could not be provided;*

(6) *estimating the additional cumulative economic impact of the proposed rule on small entities beyond that already imposed on the class of small entities by the agency or why such an estimate is not available;*

(7) *describing any disproportionate economic impact on small entities or a specific class of small entities; and*

(8) *describing any impairment of the ability of small entities to have access to credit.*

(c) **【Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.】** *Each initial regulatory flexibility analysis shall also contain a detailed description of alternatives to the proposed rule which minimize any adverse significant economic impact or maximize any beneficial significant economic impact on small entities.* Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

(d) **【(1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis】** *Each initial regulatory flexibility analysis by an agency shall include a description of—*

**【(A) any】**(1) *any projected increase in the cost of credit for small entities;*

**【(B) any】**(2) *any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and*

**【(C) advice】** (3) *advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).*

**【(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)—**

**【(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and**

**【(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).】**

#### **SEC. 604. FINAL REGULATORY FLEXIBILITY ANALYSIS.**

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, **【or】** promulgates a final interpretative rule involving the internal revenue laws

of the United States as described in section 603(a), *or adopts a revision or amendment to a land management plan*, the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain—

(1) \* \* \*

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis *(or certification of the proposed rule under section 605(b))*, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) \* \* \*

(4) a *detailed* description of and an estimate of the number of small entities to which the rule will apply or **[an explanation]** *a detailed explanation* of why no such estimate is available;

(5) a *detailed* description of the projected reporting, record-keeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6) a *detailed* description of the steps the agency has taken to **[minimize the significant economic impact]** *minimize the adverse significant economic impact or maximize the beneficial significant impact* on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; **[and]**

**[(6)](7)** **[for a covered agency, as defined in section 609(d)(2),]** a description of the steps the agency has taken to minimize any additional cost of credit for small entities**[,]** and

(8) *a detailed description of any disproportionate economic impact on small entities or a specific class of small entities.*

(b) The agency shall make copies of the final regulatory flexibility analysis available to **[members of]** the public, *including placement of the entire analysis on the website of the agency*, and shall publish in the Federal Register *the final regulatory flexibility* **[such]** analysis, or a summary thereof *which included the telephone number, mailing address, and link to the website where the complete analysis may be obtained.*

**SEC. 605. [AVOIDANCE OF DUPLICATIVE OR UNNECESSARY ANALYSES] INCORPORATIONS BY REFERENCE AND CERTIFICATIONS.**

(a) **[Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.]** *A Federal agency shall be treated as satisfying any requirement regarding the content of a regulatory flexibility agenda or regulatory flexibility analysis under section 602, 603, or 604 if the Federal agency provides in the agenda or analysis a cross-reference to the*

*specific portion of another agenda or analysis which is required by any other law and which satisfies the requirement.*

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a [statement providing the factual basis for such certification.] *detailed statement providing the factual and legal basis for such certification. The detailed statement shall include an economic assessment or a summary thereof that is sufficiently detailed to support the certification of the agency.* The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

**SEC. 606. \* \* \***

**SEC. 607. [PREPARATION OF ANALYSES] QUANTIFICATION REQUIREMENTS.**

[In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.] *In complying with sections 603 and 604, an agency shall provide—*

*(1) a quantifiable or numerical description of the effects of the proposed or final rule and alternatives to the proposed or final rule; or*

*(2) a more general descriptive statement and a detailed statement explaining why quantification is not practicable or reliable.*

**SEC. 608. [PROCEDURE FOR WAIVER OR DELAY OF COMPLETION] ADDITIONAL POWERS OF CHIEF COUNSEL FOR ADVOCACY.**

[(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

[(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule,

such rule shall lapse and have no effect. Such rule shall not be re-promulgated until a final regulatory flexibility analysis has been completed by the agency.】

*(a)(1) Not later than 270 days after the date of enactment of the Small Business Regulatory Flexibility Improvements Act, the Chief Counsel for Advocacy of the Small Business Administration shall, after opportunity for notice and comment under section 553, issue rules governing agency compliance with this chapter. The Chief Counsel may modify or amend such rules after notice and comment under section 553. This chapter (other than this subsection) shall not apply with respect to the issuance, modification, and amendment of rules under this paragraph.*

*(2) An agency shall not issue rules which supplement the rules issued under subsection (a) unless such agency has first consulted with the Chief Counsel for Advocacy to ensure that the supplemental rules comply with this chapter and the rules issued under paragraph (1).*

*(b) Notwithstanding any other law, the Chief Counsel for Advocacy of the Small Business Administration may intervene in any agency adjudication (unless such agency is authorized to impose a fine or penalty under such adjudication) and may inform the agency of the impact that any decision on the record may have on small entities. The Chief Counsel shall not initiate an appeal with respect to any adjudication in which the Chief Counsel intervenes under this subsection.*

*(c) The Chief Counsel for Advocacy may file comments in response to any agency notice requesting comment, regardless of whether the agency is required to file a general notice of proposed rule making under section 553.*

#### **SEC. 609. PROCEDURES FOR GATHERING COMMENTS.**

*(a) \* \* \**

【(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter—

【(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

【(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;

【(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

【(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency

after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

[(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

[(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

[(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

[(d) For purposes of this section, the term “covered agency” means—

[(1) the Environmental Protection Agency;

[(2) the Consumer Financial Protection Bureau of the Federal Reserve System; and

[(3) the Occupational Safety and Health Administration of the Department of Labor.

[(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

[(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

[(2) Special circumstances requiring prompt issuance of the rule.

[(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.】

*(b)(1) Prior to publication of any proposed rule described in subsection (e), an agency making the rule shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with—*

*(A) all materials prepared or utilized by the agency in making the proposed rule, including the draft of the proposed rule; and*

*(B) information on the potential adverse and beneficial economic impacts of the proposed rule on small entities and the type of small entities that might be affected.*

*(2) An agency shall not be required under paragraph (1) to provide the exact language of any draft if the rule—*

(A) relates to the internal revenue laws of the United States;

or

(B) is proposed by an independent regulatory agency.

(c) Not later than 15 days after the receipt of the materials and information under subsection (b), the Chief Counsel for Advocacy of the Small Business Administration shall—

(1) identify small entities or representatives of small entities or a combination of both for the purpose of obtaining advice, input, and recommendations from the persons about the potential economic impacts of the proposed rule and the compliance of the agency with section 603; and

(2) convene a review panel consisting of an employee from the Office of Advocacy of the Small Business Administration, an employee from the agency making the rule, and, in the case of an agency other than an independent regulatory agency, an employee from the Office of Information and Regulatory Affairs of the Office of Management and Budget to review the materials and information provided to the Chief Counsel under subsection (b).

(d)(1) Not later than 60 days after the review panel described in subsection (c)(2) is convened, the Chief Counsel for Advocacy of the Small Business Administration shall, after consultation with the members of the panel, submit a report to the agency and, in the case of an agency other than an independent regulatory agency, the Office of Information and Regulatory Affairs of the Office of Management and Budget.

(2) Each report described in paragraph (1) shall include an assessment of the economic impact of the proposed rule on small entities, including—

(A) an assessment of the impact of the proposed rule on the cost that small entities pay for energy;

(B) an assessment of the impact of the proposed rule on start-up costs for small entities; and

(C) a discussion of any alternatives that will minimize adverse significant economic impacts or maximize beneficial significant economic impacts on small entities.

(3) Each report described in paragraph (1) shall become part of the rule making record. In the publication of the proposed rule, the agency shall explain what actions, if any, the agency took in response to the report.

(e) A proposed rule is described by this subsection if the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, the head of the agency (or the delegate of the head of the agency), or an independent regulatory agency determines that the proposed rule is likely to result in—

(1) an annual effect on the economy of \$100,000,000 or more;

(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, tribal organizations, or geographic regions;

(3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or



*(4) a significant economic impact on a substantial number of small entities.*

*(f) Upon application by the agency, the Chief Counsel for Advocacy of the Small Business Administration may waive the requirements of subsections (b) through (e) if the Chief Counsel determines that compliance with the requirements of such subsections are impracticable, unnecessary, or contrary to the public interest.*

*(g) A small entity or a representative of a small entity may submit a request that the agency provide a copy of the report prepared under subsection (d) and all materials and information provided to the Chief Counsel for Advocacy of the Small Business Administration under subsection (b). The agency receiving such request shall provide the report, materials, and information to the requesting small entity or representative of a small entity not later than 10 business days after receiving such request, except that the agency shall not disclose any information that is prohibited from disclosure to the public pursuant to section 552(b) of this title.*

*(h) In this section, the term "independent regulatory agency" has the meaning given the term in section 3502 of title 44.*

#### **SEC. 610. PERIODIC REVIEW OF RULES.**

[(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

[(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—

[(1) the continued need for the rule;

[(2) the nature of complaints or comments received concerning the rule from the public;

[(3) the complexity of the rule;

[(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

[(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

[(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.]

*(a) Not later than 180 days after the date of enactment of the Small Business Regulatory Flexibility Improvements Act, each agency shall publish in the Federal Register and place on website of the agency a plan for periodic review of rules issued by the agency which the head of the agency determined have a significant economic impact on a substantial number of small entities. Such determination shall be made without regard to whether the agency performed an analysis under section 604. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the states objectives of applicable statutes, to minimize any adverse significant economic impacts or maximize any beneficial significant economic impacts on a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register and subsequently placing the amended plan on the website of the agency.*

*(b) The plan shall provide for the review of all such agency rules existing on the date of enactment of the Small Business Regulatory Flexibility Improvements Act within 10 years after the publication of the final rule in the Federal Register. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, the head of the agency shall so certify in a statement published in the Federal Register and may extend the review for not longer than 2 years after publication of notice of extension in the Federal Register. Such certification and notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration and Congress.*

*(c) The plan shall include a section that details how an agency will conduct outreach to and meaningfully include small businesses (including small business concerns owned and controlled by women, small business concerns owned and controlled by veterans, and small business concerns owned and controlled by socially and economically disadvantaged individuals (as such terms are defined in section 3 and section 8(d)(3)(C))) for the purposes of carrying out this section. The agency shall include in this section a plan for how the agency will contact small businesses and gather their input on existing agency rules.*

*(d) Each agency shall annually submit a report regarding the results of its review pursuant to such plan to Congress, the Chief Counsel for Advocacy of the Small Business Administration, and, in the case of agencies other than independent regulatory agencies (as defined in section 3502 of title 44), to the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget. Such report shall include the identification of any rule with respect to which the head of the agency made a determination described in paragraph (5) or (6) of subsection (e) and a detailed explanation of the reasons for such determination.*

(e) *In reviewing a rule pursuant to subsections (a) through (d), the agency shall amend or rescind the rule to minimize any adverse significant economic impact on a substantial number on a specific class of small entities, or maximize any beneficial significant economic impact of the rule on a substantial number of small entities to the greatest extent possible, consistent with the stated objectives of applicable statutes. In amending or rescinding the rule, the agency shall consider the following factors:*

- (1) *The continued need for the rule.*
- (2) *The nature of complaints received by the agency from small entities concerning the rule.*
- (3) *Comments by the Regulatory Enforcement Ombudsman and the Chief Counsel for Advocacy of the Small Business Administration.*
- (4) *The complexity of the rule.*
- (5) *The extent to which the rule overlaps, duplicates, or conflicts with other Federal rules and, unless the head of the agency determines it to be infeasible, State, territorial, and local rules.*
- (6) *The contribution of the rule to the cumulative economic impact of all Federal rules on the class of small entities affected by the rule, unless the head of the agency determined that such calculations cannot be made and reports that determination in the annual report required under subsection (d).*
- (7) *The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changes in the area affected by the rule.*

(f) *Each year, each agency shall publish in the Federal Register and on its website a list of rules to be reviewed pursuant to such plan. The agency shall include in the publication a solicitation of public comments on any further inclusions or exclusions of rules from the list and shall respond to such comments. Such publication shall include a brief description of the rule, the reason why the agency determined that it has a significant economic impact on a substantial number of small entities (without regard to whether it had prepared a final regulatory flexibility analysis for the rule), and request comments from the public, the Chief Counsel for Advocacy of the Small Business Administration, and the Regulatory Enforcement Ombudsman concerning the enforcement of the rule.*

#### **SEC. 611. JUDICIAL REVIEW.**

(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by **[final agency action]** *such rule* is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), **[608(b),]** and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, *(or which would have such jurisdiction if publication of the final rule constituted final agency action)* shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), **[608(b),]** and 610 in accordance with chapter 7. Agency compliance

with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

[(3)(A) A small entity] (3) A *small entity* may seek such review during the period beginning on the date of [final agency action] *publication of the final rule* and ending one year later, except that, *in the case of a rule for which the date of final agency action is the same date as the publication of the final rule*, where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

[(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than—]

#### SEC. 612. REPORTS AND INTERVENTION RIGHTS.

(a) \* \* \*

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule *or agency compliance with section 601, 603, 604, 605(b), 609, or 610*. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, *chapter 5, and chapter 7*, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

(c) \* \* \*

\* \* \* \* \*

## TITLE 15—COMMERCE AND TRADE

\* \* \* \* \*

### PART VI—PARTICULAR PROCEEDINGS

\* \* \* \* \*

#### CHAPTER 14A—AID TO SMALL BUSINESS

\* \* \* \* \*

#### SEC. 632. DEFINITIONS.

(a) \* \* \*

(1) \* \* \*

(2) \* \* \*

(A) [In general.—In addition to the criteria specified in paragraph (1), the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this chapter or any other Act.] *IN GENERAL.—*

*(i) the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for purposes of this Act or the Small Business Investment Act of 1958 (15 U.S.C. 661 et seq.); and*

(ii) *the Chief Counsel for Advocacy may specify such definitions or standards for purposes of any other Act.*

(B) \* \* \*

(C) \* \* \*

(i) \* \* \*

(ii) \* \* \*

(iii) **is approved by the Administrator.** *except in the case of a size standard prescribed by the Administrator, is approved by the Chief Counsel for Advocacy.*

(3) Variation by industry and consideration of other factors When establishing or approving any size standard pursuant to paragraph (2), the Administrator *or Chief Counsel for Advocacy, as appropriate*, shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and consider other factors deemed to be relevant by the Administrator *or Chief Counsel for Advocacy*.

\* \* \* \* \*

(9) \* \* \*

(10) **JUDICIAL REVIEW OF STANDARDS APPROVED BY CHIEF COUNSEL.**—*In the case of an action for judicial review of a rule which includes a definition or standard approved by the Chief Counsel for Advocacy under this subsection, the party seeking such review shall be entitled to join the Chief Counsel as a party in such action.*

\* \* \* \* \*

## **TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

\* \* \* \* \*

### **PART VI—PARTICULAR PROCEEDINGS**

\* \* \* \* \*

#### **CHAPTER 158—ORDERS OF FEDERAL AGENCIES; REVIEW**

\* \* \* \* \*

#### **SEC. 2341. JURISDICTION OF COURT OF APPEALS.**

As used in this chapter—

(1) \* \* \*

(2) \* \* \*

(3) \* \* \*

(A) \* \* \*

\* \* \* \* \*

(D) the Secretary, when the order is under section 812 of the Fair Housing Act; **[and]**

(E) the Board, when the order was entered by the Surface Transportation Board**[.]**; *and*

(F) the Office of Advocacy of the Small Business Administration, when the final rule is under section 608(a) of title 5.

**SEC. 2342. JURISDICTION OF COURT OF APPEALS.**

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) \* \* \*

\* \* \* \* \*

(6) all final orders under section 812 of the Fair Housing Act; [and]

(7) all final agency actions described in section 20114(c) of title 49[.]; and

(8) all final rules under section 608(a) of title 5.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

\* \* \* \* \*

## **TITLE 44—PUBLIC PRINTING AND DOCUMENTS**

\* \* \* \* \*

### **CHAPTER 35—COORDINATION OF FEDERAL INFORMATION POLICY**

\* \* \* \* \*

#### **Subchapter I—Federal Information Policy**

\* \* \* \* \*

**SEC. 3506. FEDERAL AGENCY RESPONSIBILITIES.**

(a) \* \* \*

\* \* \* \* \*

(i) \* \* \*

(j) *SMALL BUSINESSES.*—

(1) *DEFINITIONS.*—In this subsection:

(A) *FIRST-TIME VIOLATION.*—The term “first-time violation” means a violation by a small business concern of a requirement regarding collection of information by an agency, where the small business concern has not previously violated any similar requirement regarding collection of information by that same agency during the 5-year period preceding the violation.

(B) *SMALL BUSINESS CONCERN.*—The term “small business concern” has the meaning given the term in section 3 of the Small Business Act (15 U.S.C. 632).

(2) *FIRST-TIME VIOLATION.*—

(A) *IN GENERAL.*—Except as provided in paragraph (3), in the case of a first-time violation by a small business concern of a requirement regarding collection of information by

an agency, the head of the agency shall not impose a civil fine on the small business concern.

(B) *DETERMINATION.*—For purposes of determining whether to impose a civil fine on a small business concern under subparagraph (A), the head of an agency shall not take into account any violation by the small business concern of a requirement regarding collection of information by another agency.

(C) *EXCEPTION.*—An agency may impose a civil fine on a small business concern for a first-time violation if the head of the agency determines that—

(i) the violation has the potential to cause serious harm to the public interest;

(ii) failure to impose a civil fine would impede or interfere with the detection of criminal activity;

(iii) the violation is a violation of an internal revenue law or a law concerning assessment or collection of any tax, debt, revenue, or receipt.

(iv) the violation was not corrected on or before the date that is 6 months after the date on which the small business concern received notification of the violation in writing from the agency; or

(v) except as provided in paragraph (3), the violation presents a danger to the public health or safety.

(3) *DANGER TO PUBLIC HEALTH OR SAFETY.*—

(A) *IN GENERAL.*—In any case in which the head of an agency determines under paragraph (2)(C)(v) that a violation presents a danger to the public health or safety, the head of the agency may determine not to impose a civil fine on the small business concern if the violation is corrected not later than 24 hours after receipt by the owner of the small business concern of notification of the violation in writing.

(B) *CONSIDERATIONS.*—In determining whether to allow a small business concern 24 hours to correct a violation under subparagraph (A), the head of an agency shall take into account all of the facts and circumstances regarding the violation, including—

(i) the nature and seriousness of the violation, including whether the violation is technical or inadvertent or involves willful or criminal conduct;

(ii) whether the small business concern had made a good faith effort to comply with applicable laws and to remedy the violation within the shortest practicable period of time; and

(iii) whether the small business concern has obtained a significant economic benefit from the violation.

(C) *NOTICE TO CONGRESS.*—In any case in which the head of an agency imposes a civil fine on a small business concern for a violation that presents a danger to the public health or safety and does not allow the small business concern 24 hours to correct the violation under subparagraph (A), the head of the agency shall notify Congress regarding

*the determination not later than 60 days after the date on which the civil fine is imposed by the agency.*

